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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 26

Honorable PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,
Petitioner,

v.

OTTO BEHIMER and JOHN A. ROBERTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OTTO BEHIMER and JOHN A. ROBERTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Philip L. Sullivan, Chief Judge of the United States District Court for the Northern District of Illinois, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on November 26, 1958. That judgment directed the issuance of a writ of mandamus to command petitioner to vacate an order of transfer entered by him pursuant to 28 U.S.C. § 1404(a).

OPINIONS BELOW.

No opinion was delivered in the District Court. The opinion of the Court of Appeals, set forth in the Appendix at App. 1, has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals is dated November 26, 1958. This Court has jurisdiction to review that judgment by certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

Whether 28 U.S.C. § 1404(a) permits a District Court to transfer a civil action for the convenience of parties and witnesses and in the interest of justice to a district wherein venue and personal jurisdiction are obtained by reason of defendant's waiver and consent?

The judgment of the Court of Appeals herein is in direct conflict with decisions of other Courts of Appeals in the First, Second, Third, and Fifth Circuits, as outlined below. The question has not been passed on by this Court.

STATUTE INVOLVED.

Title 28 U.S.C. § 1404(a). *Change of venue*:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

On June 6, 1958, petitioner ordered that a minority stockholders' suit, which concerned the sale of assets by a Utah corporation, be transferred to the District of Utah. This sale of assets, which had taken place in Salt Lake City pursuant to the statutes of Utah, was attacked in Chicago by two stockholders of the Utah corporation, who complained of the allegedly inadequate price paid for the assets of that company. The two plaintiffs volunteered their action on behalf of 920 stockholders, the majority of whom reside in Utah. The purchasing company, which had succeeded to the seller's business conducted in Utah and other Western States, was not made a party to plaintiffs' suit. Petitioner based his order upon his finding that the transfer of the action was for the convenience of the parties and witnesses and in the interest of justice.

On November 26, 1958, the Court of Appeals, deeming it unnecessary to decide whether petitioner had properly exercised his discretion, directed that a writ of mandamus issue commanding petitioner to vacate his order of transfer solely because, in the Court of Appeals' view, petitioner, as District Judge, lacked the statutory authority to send the case to the District of Utah. This petition seeks a review of that decision.

The underlying suit which petitioner had ordered be transferred to Utah is *Behimer* v. *Standard Oil Company*, Civil Action 58 C 238. This case is a diversity action by two dissident minority stockholders of Utah Oil Refining Company ("UTOCO"). Plaintiffs seek damages from the majority stockholder, Standard Oil Company, an Indiana corporation ("Standard"), for allegedly using its majority control to cause UTOCO, a Utah corporation, to sell its assets at a price claimed to be below their fair market value. Standard, together with Standard Oil Foundation,

Inc., an Indiana charitable corporation ("Foundation"), owned 77.6% of the outstanding stock of UTOCO. Pursuant to a plan of reorganization, a proposal was made to the UTOCO stockholders that a newly organized wholly owned Standard subsidiary purchase UTOCO's assets, paying therefore 695,558 shares of Standard stock and additionally assuming UTOCO's liabilities.[1] The Standard stock was then to be distributed by UTOCO to its stockholders on a 1 for 2 basis.

This proposal was overwhelmingly approved at a special meeting of stockholders held in Salt Lake City, Utah on July 11, 1956, with over 96% of the stock voting in favor (over 82% of the non-Standard stock) and only 1% (5% of the non-Standard stock) opposed. The sale was accordingly consummated later in the month of July, 1956. In September, 1956, upon notice to all stockholders and without intervention or protest by them, a decree of dissolution of the Utah corporation was entered by the District Court of the State of Utah, Third Judicial District, County of Salt Lake.

On February 13, 1958, the two plaintiffs, respondents here, filed suit against Standard and Foundation in the United States District Court for the Northern District of Illinois. Jurisdiction was based upon diversity of citizenship (28 U.S.C. § 1332, prior to its recent amendment), the two plaintiffs being, respectively, citizens and residents of Illinois and New York. Plaintiffs proffered their action "on behalf of themselves and the other minority stockholders of UTOCO who are or were similarly situated to

[1] This proposal had been approved by UTOCO's directors, who submitted it in full detail to the stockholders upon the express understanding that the sale would not take place unless it met with the affirmative vote of Standard and the holders of more than 50% of the outstanding stock of UTOCO other than that held by Standard and Foundation.

plaintiffs, as a representative suit." As noted above, the class whom plaintiffs seek to represent in the Northern District of Illinois were for the most part residents of the State of Utah.[2]

Denying any wrongful conduct, defendants answered plaintiffs' charges, moved to dismiss the class action aspect of the case on the ground, among others, of plaintiffs' inadequate representation, and moved to transfer the cause to the District of Utah where the majority of plaintiffs' alleged class resided.[3]

The transaction about which plaintiffs complain grew out of matters that had occurred in Utah. The parties' rights are governed by Utah law. A majority of the alleged class reside in Utah. Plaintiffs might have brought their suit in Utah either as a derivative action under 28 U.S.C. §§ 1401 and 1695, or as a class action against the purchasing corporation. Nevertheless, plaintiffs chose to file their suit in Chicago and opposed defendants' transfer motion on the ground that neither defendant was a resident, doing business, or amenable to process in Utah. Defendants' motion, however, had met that circumstance with this recital:

[2] Of the 920 UTOCO stockholders, 575 reside in Utah; 173 more reside in other Intermountain or Pacific Coast States. These 748 stockholders account, in number of shares, for over 73% of the shares of stock held by all members of the purported class (125,643 shares out of 170,577), in contrast to the 1900 shares owned by the two plaintiffs.

[3] Petitioner did not act on the motions to dismiss, stating in his answer in response to the Rule to Show Cause in the Court of Appeals: "I believe the forum best suited to consider defendants' attack upon the adequacy of [the plaintiffs'] representation of the alleged class would be the forum of Salt Lake City, Utah, in which State the majority of the class reside, and to whose judge the members could much more readily make known their views."

> "The defendants, by their attorneys, formally assure this Court that, in the event of the transfer of this suit as requested, their personal appearances will be entered in, and they will waive any legal privilege they may have as to the venue of, the United States District Court for the District of Utah, Central Division."

Petitioner, acting in reliance upon *General Casualty Co.* v. *Grubb*, 253 F.2d 51 (7th Cir. 1958) (discussed hereafter) as to his power to transfer, and upon *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947) as to the indicia by which his discretion to exercise such power should be guided,[4] granted the transfer motion.[5] Plaintiffs thereupon sought to prevent this transfer by a writ of mandamus from the Seventh Circuit.

Meanwhile, the Seventh Circuit had under consideration another petition to review a § 1404(a) transfer decision by writ of mandamus. The circumstances of that

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[4] Petitioner considered eight reasons which he felt compelled the transfer: the Utah residence of a majority of the class, the presence in Utah of all the UTOCO directors and all but two of fifty-one allegedly "controlled" stockholders, the Utah situs of the books and records of UTOCO, the location of UTOCO's assets (whose value was in question) in Utah and other western states, the amenability to suit in Utah of the purchasing corporation, the disruption of the business of UTOCO's successor if its officers and directors were to attend to a Chicago trial, the Utah Court's familiarity with Utah law by which this case is to be governed, and the heavier congestion of the calendar of petitioner's court.

[5] The transfer of this case from Chicago to Utah will place the controversy in a forum readily accessible to a majority of the alleged class. That will encourage greater class participation in this litigation and effect a corresponding reduction in possible future suits involving the same subject matter. Spurious class actions, such as the present suit is believed to be, are only binding upon those members of the alleged class who appear and participate in the litigation. 3 Moore Federal Practice (2nd Ed. 1948) ¶ 23.11, at 3472.

case, *Blaski* v. *Hoffman*, had already been before the Fifth Circuit, which held that § 1404(a) empowered a Texas District Judge to transfer the action to the Northern District of Illinois wherein venue and service of process were based solely on waiver and consent. *Ex Parte Blaski*, 245 F.2d 737 (5th Cir. 1957), *cert. denied*, 355 U.S. 872 (1957). When Judge Hoffman in Chicago refused plaintiffs' request to send that case back to Texas, plaintiffs sought mandamus to compel the re-transfer. The Seventh Circuit at first unanimously denied the writ on the authority of its own decision in *General Casualty Co.* v. *Grubb*, 253 F.2d 51 (7th Cir. 1958), *cert. denied*, 357 U.S. 907 (1958) (not reported; herein App. 8). On rehearing, however, the Seventh Circuit granted a writ of mandamus on October 16, 1958. *Blaski* v. *Hoffman*, 260 F.2d 317 (7th Cir. 1958) (herein App. 10). Because of this intra-circuit conflict with *General Casualty Co.* v. *Grubb*, *supra*, Respondent Judge Hoffman moved for a rehearing *en banc*, and petitioner in this case filed a supporting brief *amicus curiae*. Rehearing was denied. A petition for certiorari to review that decision has already been filed in this Court. *Hoffman* v. *Blaski*, No. 597, October Term, 1958.

One day after the *en banc* rehearing was denied in *Blaski* v. *Hoffman* the panel hearing the instant case awarded a writ of mandamus commanding petitioner to vacate his order of transfer. In an opinion that sketches the facts and incorporates language from *Blaski* v. *Hoffman*, opinion, the Court held that 28 U.S.C. § 1404(a) conferred no authority to transfer to a District where venue and service of process were dependent upon waiver and consent in defendant's motion to transfer. *Behimer* v. *Sullivan*, ... F.2d .... (7th Cir. 1958) (herein App. 1).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Seventh Circuit decision in this case, (and in *Blaski* v. *Hoffman*, No. 597, October Term, 1958), is in direct conflict with the decisions of other Courts of Appeals on the same matter:

1. **Fifth Circuit.** *Ex Parte Blaski*, 245 F.2d 737 (1957), *cert. denied*, 355 U.S. 872 (1957).
2. **First Circuit.** *In Re Josephson*, 218 F.2d 174 (1954).
3. **Second Circuit.** *Anthony* v. *Kaufman*, 193 F.2d 85 (1951), *cert. denied*, 342 U.S. 955 (1952);
   Torres v. *Walsh*, 221 F.2d 319 (1955), *cert. denied*, 350 U.S. 836 (1955).
4. **Third Circuit.** *Paramount Pictures* v. *Rodney*, 186 F.2d 111 (1950), *cert. denied*, 340 U.S. 953 (1951).

II.

The Seventh Circuit's decision in this case (and in *Blaski* v. *Hoffman*) is the subject of a direct intra-circuit conflict with another Seventh Circuit case involving a different panel of judges: *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (7th Cir. 1958), *cert. denied*, 357 U.S. 907 (1958).

III.

This case involves an important question of federal law which has not been but should be settled by this Court.

ARGUMENT.

I.

Conflict With Other Circuits.

By the Seventh Circuit's own admission[6] its decision in the *Blaski* case, and by the same token in this case, is directly contrary to that of the Fifth Circuit in *Ex Parte Blaski, supra.* While suggesting "some points of distinction"[7] from the other cases cited above, the Court conceded that "all these cases contain language which in one way or another supports the power of the Texas Court in the instant matter."[8]

In *Paramount Pictures* v. *Rodney, supra,* the Third Circuit held that § 1404(a) gave a District Court authority to transfer to Texas a civil antitrust action against fourteen defendants, including five as to whom venue could not originally have been laid in that jurisdiction. Likewise, in *Anthony* v. *Kaufman, supra,* the Second Circuit approved the transfer of a case to a district where one of the two defendants could not have been served and where, as to it, venue was improper. In *In Re Josephson, supra,* the First Circuit also rejected a want of authority argument in approving an order transferring to New Mexico a derivative action by a New York stockholder against a New Mexico Corporation and three citizens of Massachusetts who were not subject to service of process in New Mexico. In each case defendants waived any objections to venue and agreed to enter their appearances in the transferee court.

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[6] Opinion, App. 17-18.

[7] Opinion, App. 18.

[8] Ibid.

The Seventh Circuit suggested that these cases might be distinguished on the ground that in each one of them the action might in the first instance have been brought in the transferee district against one or more (though not all) defendants. But it is submitted that Chief Judge Biggs, Chief Judge Magruder and Judge Frank would not, and in fact did not, rest the transfer law of their respective circuits on so precarious a subtlety.

The *Rodney* ruling was placed squarely upon the circumstance that "defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court."[9] In *Anthony* v. *Kaufman*, *supra*, Judge Frank put it this way:

> "But here, one defendant could have been served in the transferee district, while the other defendant, which could not there have been served, has joined in the application for, and thus consented to, the transfer. That consent is a waiver of lack of venue; had such a waiver existed before plaintiff commenced suit, it could have been brought there. We think 28 U.S.C. § 1404 (a) covers such a case."[10]

In the *Josephson* case the Court held that the transferee venue was proper since the corporation could have sued the other defendants in that forum. 28 U.S.C. § 1401. The stockholder argued in that case that the action was not one that "might have been brought" in the District of New Mexico since the Massachusetts defendants were not subject to service of process in that jurisdiction. Terming such a supposed requirement a "gloss upon § 1404(a)," Chief Judge Magruder wrote:

> "Even in the Second Circuit, which seems to have originated this gloss upon § 1404(a), it now appears to be recognized that transfer to a district in which

[9] 186 F. 2d, at 114.

[10] 193 F. 2d, at 86.

the defendants would not have been originally amenable to process would be all right if the defendants consent to the transfer. See *Ford Motor Co.* v. *Ryan*, 2 Cir., 1950, 182 F. 2d 329, certiorari denied, 1950, 340 U.S. 851, 71 S. Ct. 79, 95 L. Ed. 624; *Anthony* v. *Kaufman*, 2 Cir., 1951, 193 F. 2d 85, certiorari denied, 1952, 342 U.S. 955, 72 S. Ct. 629, 96 L. Ed. 710; *Welch* v. *Esso Shipping Co.*, D.C.S.D.N.Y. 1953, 112 F. Supp. 611; *Mire* v. *Esso Shipping Co.*, D.C.S.D. N.Y. 1953, 112 F. Supp. 612. That qualification was fully satisfied in the case at bar, since not only have the defendants been served with process in Massachusetts but they have all formally agreed to enter their appearance in the federal court of the transferee district and to waive any question of venue or of the personal jurisdiction of the transferee court over them." [11]

As the opinions adequately demonstrate, the foregoing cases did not rest on the technicality suggested by the Seventh Circuit. Nor could they have done so, for the "distinction" is without legal significance. If consent and waiver will not cure the transferee court's absence of personal jurisdiction and venue over certain defendants, it is difficult to see how that defect is cured by the fact that some other defendants are amenable to service and venue. By transferring the action against all defendants rather than merely that against defendants who might in the first instance have been sued in the transferee forum, the cited cases held that the action "might have been brought" against all within the meaning of 28 U.S.C. § 1404(a).[12]

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[11] 218 F. 2d, at 185.

[12] Compare *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9th Cir. 1950), and *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (2nd Cir. 1950), where District Courts were held without authority under § 1404(a) to transfer cases to districts where the defendants were not subject to service of process. The proposed transfers there, however, were at the instance of the *plaintiff*, and defendants had not given their consent.

The Second Circuit's decision in *Torres* v. *Walsh*, *supra*, cannot be brushed aside merely by characterizing it as a proceeding in admiralty. That action, which began with the libel of a vessel in the Southern District of New York, was transferred to the District of Puerto Rico. Since the vessel located in New York could not have been libelled by a federal court in Puerto Rico, the legal issue with respect to the language of § 1404(a) was identical with that in the instant case. The Second Circuit sustained the transfer power, holding that because respondent had filed the appropriate bond and had undertaken to appear in the Puerto Rican action, the District Court of that jurisdiction was "in effect a court where the action might have been brought.[13]

Finally, the Fifth Circuit's *Ex Parte Blaski*, *supra*, is clearly in direct conflict with the decision below. There the Court remarked:

> "The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court."[14]

The foregoing sufficiently demonstrates that the decision below is in direct conflict with the decisions of four other Courts of Appeals.[15]

[13] 221 F. 2d, at 321.

[14] 245 F. 2d, at 738.

[15] Notwithstanding the fact that the predecessor of 28 U.S.C. § 1391(a) directed that diversity cases "*shall* be brought *only* in the district of the residence of either the plaintiff or the defendant" (emphasis added), such actions "might [have been] brought" in other districts and prosecuted to judgment absent a seasonable assertion by the defendant of his venue privilege. *Commercial Ins. Co.* v. *Stone Co.*, 278 U.S. 177 (1929).

II.

Intra-Circuit Conflict.

The Seventh Circuit's decision in the instant case is the subject of an intra-circuit conflict with *General Casualty Co.* v. *Grubb, supra,* a case involving a different panel of judges. There the Court approved a § 1404(a) transfer to the Northern District of Oklahoma of a declaratory judgment action involving the interpretation of an insurance policy brought by the insurer, a Washington corporation, against two citizens and residents of Wisconsin. While the Court speaks in terms of discretion rather than authority, the following passage from the opinion in that case demonstrates that the statutory question involved here was resolved there:

> "By their motion to transfer defendants have agreed to become amenable to process in Oklahoma, and we cannot say Judge Grubb abused his discretion by viewing their consent as squaring with the phrase 'where it might have been brought' found in § 1404. See *Ex Parte Blaski*, 5 Cir., 1957, 245 F. 2d 737."[16]

Petitioner, as *amicus curiae,* supported the *Blaski* v. *Hoffman* attempt to have the Seventh Circuit sit *en banc* to resolve this intra-circuit conflict. Compare *Robinson* v. *Johnston,* 316 U.S. 649 (1942). The Court (with two judges dissenting) declined to do so, and since the legal question in the instant case is identical with that in *Blaski* v. *Hoffman,* petitioner felt it would be presumptive to renew the *en banc* motion in this case. From all appearances the conflict can only be resolved by this Court.

[16] 253 F. 2d, at 53.

III.

Importance of Question.

This case involves an important question which has not been but should be resolved by this Court. Section 1404(a) was meant to reduce the cost and improve the quality of judicial administration. The volume of interpretive litigation suggests that it has fallen short its goal. Section 1404(a) has in fact introduced new elements of uncertainty and complexity. As the decisions in the footnote reveal, litigation over the question presented in this case has more than contributed its share to the complexities, the uncertainties, the delays, and the expense.[17]

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[17] *General Casualty Co.* v. *Keller*, 154 F. Supp. 451 (E.D. Wis. 1957), mandamus refused, *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (7th Cir. 1958), *cer. denied*, 357 U.S. 907 (1958); *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957), *cert. denied*, 355 U.S. 872 (1957); *Hill* v. *Upper Miss. Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956); *Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir. 1955), *cert. denied*, 350 U.S. 836 (1955); *General Electric Co.* v. *Central Transit Whse. Co.*, 127 F. Supp. 817 (W.D. Mo. 1955); *Felchlin* v. *American Smelting & Rfg. Co.*, 136 F. Supp. 577 (S.D. Calif. 1955); *In Re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Cain* v. *Bowater's Newfoundland Pulp and Paper Mills*, 127 F. Supp. 949 (E.D. Penna. 1954); *Sheridan* v. *Pan-American Rfg. Corp.*, 123 F. Supp. 81 (S.D.N.Y. 1954); *Welch* v. *Esso Shipping Co.*, 112 F. Supp. 611 (S.D.N.Y. 1953); *Mire* v. *Esso Shipping Co.*, 112 F. Supp. 612 (S.D.N.Y. 1953); *Johnson* v. *Harris*, 112 F. Supp. 338 (E.D. Tenn. 1953); *United States* v. *Reid*, 104 F. Supp. 260 (E.D. Ark. 1952); *Anthony* v. *Kaufman*, 193 F. 2d 85 (2d Cir. 1951), *cert. denied*, 342 U.S. 955 (1952); *Wilson* v. *Kansas City So. Ry. Co.*, 101 F. Supp. 56 (W.D. Mo. 1951); *Tivoli Realty Inc.* v. *Paramount Pictures*, 89 F. Supp. 278 (D. Del. 1950), mandamus granted, *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (3d Cir. 1950), *cert. denied*, 340 U.S. 953 (1951); *United States* v. 11 *Cases, etc.*, 94 F. Supp. 925 (D. Ore. 1950); *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45 (S.D.N.Y. 1950), mandamus denied, *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950); *Hamilton Theatres* v. *Paramount Film Dist. Corp.*, 90 F. Supp. 645 (D.D.C. 1950).

CONCLUSION.

The conflict the Seventh Circuit has created on this question is sure to prolong the controversy until it is resolved by this Court. Your petitioner is interested in this matter from his desire to see a most important and controverted question authoritatively settled, and for that reason respectfully submits that a writ of certiorari should be granted in this case.

Respectfully submitted,

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